# Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-763 OF 1996
MAHADEV SHANKAR, MOKHTAR SIDIN AND DENIS ONG JJCA
15 NOVEMBER 1997

***Civil Procedure*** *— Appeal — Leave to appeal — Whether contributories to a company who did not appear in the court below have a right of appeal without leave — Whether such contributories may be deemed a party to the proceedings — Whether contributories could be allowed to intervene at the appellate stage — Whether leave to appeal should be granted*

***Civil Procedure*** *— Parties — Intervention — Whether contributories to a company who did not appear in the court below may intervene at the appellate stage — Whether such contributories were deemed parties and not interveners to the proceedings*

***Civil Procedure*** *— Appeal — Right of appeal — Whether creditors and contributories who appeared in the court below have a right to be heard on the appeal if no notice of appeal was filed — Whether court may reasonably hear interested persons as amicus curiae*

***Civil Procedure*** *— Locus standi — Directors — Appeal against order to wind up company — Appeal filed by directors of company — Whether directors have locus standi to file appeal — Whether omission of the company to obtain a stay of the winding-up order limits the residual power of its directors to prosecute an appeal*

***Civil Procedure*** *— Costs — Security for costs — Discretion of court — Whether order for payment into court should be made*

The appellant was a limited company which ran an international school known as Fairview Schools. In 1994, a petition was filed by the respondents to wind up the appellant. The appellant's application to the High Court for a stay of the winding-up proceedings was refused. The appellant then filed an appeal against the decision. In the High Court, 98 creditors whose children were studying in Fairview Schools and 58 contributories had filed notices of intention to appear in the proceedings. At the appeal stage, two contributories ('the proposed interveners') who did not file any notice to appear in the High Court had applied for permission to intervene in this appeal. The court had to decide on the preliminary issues of whether: (i) the proposed interveners had a right of appeal; (ii) other creditors and contributories had a right to be heard on this appeal; (iii) the directors of the appellant who brought the appeal had locus standi to bring it; and (iv) the directors of the appellant should pay into court RM50,000 by way of deposit as security for costs and expenses incidental to this appeal. Counsel for the respondent argued that there was nothing in the Companies (Winding-up) Rules 1972 ('the Winding-up Rules') that permitted the intervention and that the Rules of the High Court 1980 ('the RHC') were irrelevant to the proceedings.

**Held**, dismissing the proposed interveners' application for leave and granting the appellant's directors the right to appeal:

(1) The petition was filed under s 218 of the Companies Act 1965 ('the Act'). Order 88 r 5 of the RHC does not refer to applications to wind up under s 218 of the Act. Therefore, the initiation of such petitions, their form, etc must of necessity be governed by the special provisions contained in the Winding-up Rules. However, interested parties are not so strait-jacketed by the Winding-up Rules as to be without a remedy on matters where these rules are silent. Where the Winding-up Rules make specific provisions for a particular matter, it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not, it can always resort to O 92 r 4 of the RHC. The powers of the court on hearing a petition provided by s 221 of the Act are exercised in conformity with the RHC and the appeal is a rehearing (see p 106F, I).

(2) The contributories and creditors who appeared in the court below had an independent right of appeal. They would indeed be well advised to exercise that option, if they wished as of right, to address the appellate court to vary or set aside the High Court order.

However, in this case, the proposed interveners were not persons who appeared in the court below. They had no right of appeal without leave. Such leave was required not because they were interveners but because they were parties who allowed judgment to be made against them by default of appearance. Since service under s 218 of the Act is by advertisement, all creditors and contributories are 'parties' who are deemed to be served and can participate in the proceedings. Whether they appear or not, they would be bound by the winding-up order because s 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories. Therefore, a contributory or creditor in a winding-up is a party and not an intervener. Wilful failure to participate in the proceedings and acquiescing to the order would provide grounds for refusal of leave. Since the interveners did not explain why they had not appeared in the court below, their application was dismissed (see p 107B–C, G–H); *Re Securities Insurance Co* [1894] 2 Ch 410 followed and *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 distinguished.

(3) The creditors and contributories who appeared in the court below did not have a right to be heard on the appeal unless they had filed a notice of appeal. Otherwise they may substantially add to the costs of appeal without the corresponding risk of compensating the other parties who may be injuriously affected by the protracted proceedings. However, the court may reasonably

hear other persons who have an interest in the company as amicus curiae (see p 108B–C); *Re Bradford Navigation Co* (1870) LR 5 Ch App 600 followed.

(4) The directors of the appellant had locus standi to bring the appeal. The omission of the appellant to obtain a stay of the winding-up order under s 243 of the Act in no way limited the residual power of its directors to prosecute an appeal. A winding-up order would generally mean that the company must stop trading and a stay of winding-up means the company is free to continue trading. However, the absence of a stay does not affect the appellate process, although an appeal by itself does not amount to a stay of execution (see p 108G–H); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 followed.

(5) All matters concerning costs are in the discretion of the court and this discretion can vary from case to case. On the facts, it was deemed fit to limit the sum required by way of security for costs to RM30,000 (see pp 108I and 109D).

**[Bahasa Malaysia summary**

Perayu adalah sebuah syarikat berhad yang mengendalikan sekolah antarabangsa dikenali sebagai Fairview Schools. Pada tahun 1994, satu petisyen telah difailkan oleh penentang-penentang untuk menggulung perayu. Permohonan perayu ke Mahkamah Tinggi untuk penggantungan prosiding penggulungan telah ditolak. Perayu kemudiannya telah memfailkan rayuan terhadap keputusan itu. Di Mahkamah Tinggi, 98 pemiutang yang mana anak-anak mereka belajar di Fairview Schools dan 58 pencarum telah memfailkan notis-notis tentang hasrat untuk hadir di prosiding. Pada peringkat rayuan, dua pencarum ('pencelah-pencelah cadangan') yang tidak memfailkan apa-apa notis untuk hadir di Mahkamah Tinggi telah memohon kebenaran untuk mencelah dalam rayuan ini. Mahkamah perlu memutuskan isu-isu permulaan sama ada: (i) pencelah-pencelah cadangan mempunyai hak untuk merayu; (ii) pemiutang-pemiutang dan pencarum-pencarum lain mempunyai hak untuk didengar di rayuan ini; (iii) pengarah-pengarah perayu yang membawa rayuan mempunyai locus standi untuk membawanya; dan (iv) pengarah-pengarah perayu patut membayar kepada mahkamah RM50,000 secara deposit sebagai jaminan untuk kos dan perbelanjaan sampingan rayuan ini. Peguam kepada penentang menghujahkan bahawa tidak terdapat apa-apa dalam Peraturan-Peraturan (Penggulungan) Syarikat 1972 ('Peraturan-Peraturan Penggulungan') yang membenarkan pencelahan dan bahawa Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah tidak relevan kepada prosiding.

**Diputuskan**, menolak permohonan pencelah-pencelah cadangan untuk kebenaran dan memberikan pengarah-pengarah perayu hak untuk merayu:

(1) Petisyen tersebut difailkan di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'). Aturan 88 k 5 KMT tidak merujuk kepada permohonan-permohonan untuk penggulungan di bawah s 218 Akta tersebut. Oleh itu, pemulaan petisyen sedemikian, bentuknya, dan lain-lain mesti sebagai keperluan dikawal oleh peruntukan-peruntukan khas yang terkandung dalam Peraturan-Peraturan Penggulungan. Bagaimanapun, pihak-pihak yang berkepentingan tidak begitu dikongkong oleh Peraturan-Peraturan Penggulungan sehinggakan tiada remedi atas perkara-perkara di mana peraturan-peraturan ini tidak memberikan apa-apa peruntukan. Di mana Peraturan-Peraturan Penggulungan membuat peruntukan-peruntukan yang spesifik bagi perkara tertentu, ia akan mengecualikan peruntukan yang sama dalam kaedah-kaedah mahkamah tetapi di mana Peraturan-Peraturan Penggulungan adalah senyap atas perkara yang belum selesai di hadapan mahkamah, mahkamah mesti mengambilpakai prosedurnya sendiri di mana terdapat peruntukan nyata. Jika tidak, ia sentiasa boleh menggunakan A 92 k 4 KMT. Kuasa-kuasa mahkamah dalam membicarakan petisyen yang diperuntukkan oleh s 221 Akta tersebut dilaksanakan mematuhi KMT dan rayuan itu merupakan pembicaraan semula (lihat ms 106F, I).

(2) Pencarum-pencarum dan pemiutang-pemiutang yang hadir di mahkamah bawah mempunyai hak rayuan yang bebas. Mereka sepatutnya dinasihatkan untuk menjalankan opsyen itu, sekiranya mereka mahu sebagai satu hak, untuk meminta mahkamah rayuan mengubah atau mengetepikan perintah Mahkamah Tinggi.

Bagaimanapun, dalam kes ini, pencelah-pencelah cadangan bukannya orang yang hadir di mahkamah bawah. Mereka tidak mempunyai hak rayuan tanpa kebenaran. Kebenaran sedemikian adalah diperlukan bukan kerana mereka adalah pencelah tetapi kerana mereka adalah pihak-pihak yang membenarkan penghakiman dibuat terhadap mereka melalui keingkaran kehadiran. Oleh kerana penyampaian di bawah s 218 Akta tersebut adalah melalui pengiklanan, kesemua pemiutang dan pencarum adalah 'pihak-pihak' yang dianggap telah disampaikan dan boleh mengambil bahagian dalam prosiding. Sama ada mereka hadir atau tidak, mereka akan terikat dengan perintah penggulungan kerana s 226(4) Akta tersebut menganggap bahawa perintah penggulungan dibuat atas petisyen bersama kesemua pemiutang dan pencarum. Oleh itu, seseorang pencarum atau pemiutang dalam penggulungan adalah satu pihak dan bukannya pencelah. Kegagalan secara sengaja untuk mengambil bahagian dalam prosiding dan akuiesens kepada perintah akan menyediakan alasan bagi penolakan kebenaran. Oleh kerana pencelah-pencelah tidak menjelaskan mengapa mereka tidak hadir di mahkamah bawah, permohonan mereka ditolak (lihat ms 107B–C, G–H); *Re Securities Insurance Co* [1894] 2 Ch 410 diikut dan *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 dibeza.

(3) Pemiutang-pemiutang dan pencarum-pencarum yang hadir di mahkamah bawah tidak mempunyai hak untuk didengar atas rayuan melainkan mereka telah memfailkan notis rayuan. Jika tidak mereka secara substantial akan menambah kos rayuan tanpa risiko sepadan untuk memberikan pampasan kepada pihak-pihak lain yang mungkin akan terjejas akibat prosiding yang berlanjutan. Bagaimanapun, mahkamah boleh secara munasabah mendengar orang lain yang mempunyai kepentingan dalam syarikat sebagai amicus curiae (lihat ms 108B–C); *Re Bradford Navigation Co* (1870) LR 5 Ch App 600 diikut.

(4) Pengarah-pengarah perayu mempunyai locus standi untuk membawa rayuan. Peninggalan perayu untuk memperolehi penggantungan perintah penggulungan di bawah s 243 Akta tersebut dalam apa cara pun tidak menghadkan kuasa baki pengarah-pengarahnya untuk meneruskan suatu rayuan. Perintah penggulungan secara amnya bermakna bahawa syarikat mesti berhenti berniaga dan penggantungan penggulungan bermakna syarikat adalah bebas untuk meneruskan perniagaan. Bagaimana pun, ketiadaan penggantungan tidak menjejaskan proses rayuan, walaupun suatu rayuan dengan sendirinya tidak sama dengan penggantungan pelaksanaan (lihat ms 108G–H); *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 diikut.

(5) Semua perkara berkenaan dengan kos berada dalam budi bicara mahkamah dan budi bicara ini boleh berubah daripada satu kes ke kes yang lain. Atas fakta-fakta, adalah dianggap wajar untuk menghadkan jumlah yang diperlukan sebagai jaminan kos kepada RM30,000 (lihat ms 108I dan 109D).]

**Notes**

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 478–506.

For cases on intervention, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2404–2414.

For a case on right to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 641.

For a case on locus standi of directors, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2280.

For cases on security for costs, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 970–998.

**Cases referred to**

*Bradford Navigation Co, Re* (1870) LR 5 Ch App 600 (folld)

*Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 (refd)

*Laverton Nickel NL, Re* [1997] 3 ACLR 945 (refd)

*Mawcon Ltd, Re* [1969] 1 All ER 188 (refd)

*Securities Insurance Company, Re* [1894] 2 Ch D 410 (folld)

*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 (folld)

*Taman Sungai Dua Development Sdn Bhd v Goh Boon Kim* [1997] 2 MLJ 526 (refd) A

*Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 (distd)

*Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4 (refd) B

**Legislation referred to**

Companies Act 1965 ss 4, 218, 219(2), 221, 226(3), (4), 253(2), 289

Companies (Winding-up) Rules 1972 r 28 C

Courts of Judicature Act 1964 ss 44, 67

Rules of the High Court 1980 O 88 r 5, O 92 r 4

*WSW Davidson* (*Conrad Young* with him) (*Azman Davidson & Co*) for the appellant.

*Raja Aziz Addruse* (*P Gananathan* and *Robyn Choi* with him) for the D
oppossing contributories/creditors.

*Noorin Badaruddin* for the Official Receiver.

*Yusof Khan* (*Yusof Khan & Pathmanathan*) for the respondents.

**Mahadev Shankar JCA** (delivering the judgment of the court): This is an E
appeal against an order to wind up the appellant ('the company'). The company's application in the High Court for a stay of the winding-up proceedings was refused. The appeal was initially listed for hearing on 30 August 1997.

In the High Court, Messrs Azhar & Wong filed a notice of intention F
to appear on petition on behalf of 98 'creditors' whose children were then studying in the Fairview Schools, and another such notice on behalf of 57 persons who were contributories, each holding 50 shares in the company. Mr Davidson was instructed to represent them as counsel. They ('the opposing contributories and creditors') opposed the petition. So did the G
company. There was no conflict of interest.

The petitioners were also contributories of the company. Mr PS Sundram owned no shares in the company. He was the only person who appeared to support the petition. He had earlier filed a civil suit against the company which was still pending.

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After being served the appeal record, the respondents filed a motion praying for an order that:

(i) the appeal be struck out on the ground that the persons who had brought it had no locus standi;

(ii) alternatively that the directors of the company pay into court I
RM50,000 by way of deposit as security for costs and expenses incidental to this appeal; and

(iii) that the costs of this application be paid by the respondents in any event.

These respondents, who were the petitioners in the court below, are hereafter referred to as 'the petitioners'.

Another motion was filed by one Pargash Singh and Chee Soo Teng ('the proposed interveners'), praying that they be permitted to intervene in this appeal. At all material times, the children of the proposed interveners had been pupils in the schools, and both of them were contributories of the company in the sense that each held 50 shares in the company. Their names were not included in either of the lists of persons intending to appear in the High Court. Pargash Singh and Chee Soo Teng claimed in this appeal that they would be representing the interests of the opposing contributories and creditors.

On 3 July 1997, Chian Ngook For filed an affidavit exhibiting the resolution of the board of directors made on 10 December 1996, that the company does prosecute this appeal and Azman Davidson & Co be appointed to act for the company.

The appeal eventually came up for disposal on 6 October 1997. We heard the motion to intervene first. Raja Aziz, as counsel for the proposed interveners, referred us to s 289 of the Companies Act 1965 ('the Act') which encourages the court to have regard to the wishes of the creditors and contributories 'as to all matters relating to a winding up'. He also referred to *Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4 at p 6 where D'cotta J dealt with s 289 of the Singapore Act and referred to *Palmer's Company Law* (20th Ed) at p 701. Intraco obtained the order to wind up because Wei Giap was unable to pay its debt. Some of the creditors opposing the petition had filed affidavits in the High Court claiming that if Wei Giap was allowed to continue to operate, their chances of recovery would be greater. These creditors had not filed any independent appeal. The only named appellant on record against the winding-up order was Wei Giap, and the opposing creditors were not separately represented in the appeal. The issues before us are not the same.

Raja Aziz said that in addition to the proposed interveners, he also represented the opposing contributories and creditors, on whose behalf a submission had been made to the trial judge by Mr Davidson. He further stated that since there was no set procedure as to how creditors or contributories could inject themselves into the appeal, the application was being made *ex abundanti cautela.*

Encik Yusof Khan's first submission was that, as there was nothing in the Companies (Winding-up) Rules 1972 ('the Winding-up Rules') permitting intervention, the application was misconceived. He said the Rules of the High Court 1980 ('the RHC') were irrelevant. He relied on *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 at p 295 where the judgment reads (per Gunn Chit Tuan SCJ):

> On the other hand, an order for a company to be wound up on a petition under s 217 of the Companies Act 1965 may only be made by a court if one of the circumstances specified in the following s 218(1) of the Companies Act has been proved: ... [Section 218(1) of the Act was then set out and the judgment continues]. In such a case, the Rules of the High Court 1980 do not apply.

His second submission was based on a passage of 7 *Halsbury's Laws of England* (4th Ed) para 1395, the relevant portions of which read as follows: A

> Appeal from winding-up order
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> An appeal against a winding-up order may be brought by a creditor or contributory who has appeared in the winding-up court or by the company itself [see *Re Diamond Fuel Co* (1879) 13 Ch D 400; *Re Photographic Artists' Co-operative Supply Association* (1883) 23 Ch D 370. Contributories or creditors who have not appeared below cannot appeal with leave: *Re Securities Insurance Co* [1894] 2 Ch 410. Other interested persons have no right to appeal, but may be heard as amicus curiae: *Re Bradford Navigation Co* (1870) 5 Ch App 600]. *If the company is the only appellant, security for the costs of the appeal must be given, not out of the company's funds, but from an outside source, namely by the directors or shareholders who are supporting the appeal and the security must be substantial* [see *Re Consolidated South Rand Mines Deep Ltd* [1909] WN 66; *Re EK Wilson & Sons Ltd* [1972] 2 All ER 160, [1972] 1 WLR 791. Except in special circumstances, application for security must be made before the appeal is in the paper for hearing: *Re Indian, Kingston & Sandhurst Mining Co* (1882) 22 Ch D 83. If notice of appeal has been given but not set down, it is doubtful whether the court has such seisin of the appeal as to be able to order security].
>
> An appeal from a winding-up order may be brought without the leave of the court, as the order is a final order and not an interlocutory judgment. (Emphasis added.)

B C D E

The distinction between final and interlocutory orders made in *Halsbury's* is not relevant to us (see s 67 of the Courts of Judicature Act 1964). In the court below, the title to the petition proclaimed that it was filed under s 218 of the Companies Act 1965. Order 88 r 5 of the RHC does not refer to applications to wind up under s 218 of the Act. Therefore, the initiation of such petitions, their form, etc must of necessity be governed by the special provisions contained in the Winding-up Rules. We are unable however to countenance En Yusof Khan's contention that interested parties are so strait-jacketed by the Winding-up Rules as to be without a remedy on matters where these rules are silent. F

For ourselves, we would give a liberal interpretation to s 253(2) of the Act which reads as follows: G

> Powers of Court cumulative
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> Subject to the *rules* an appeal from any order or decision made or given in the winding up of a company shall lie in the *same* manner and subject to the *same* conditions as an appeal from any order or decision of the *court* in cases within its ordinary jurisdiction. (Emphasis added.)

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By s 4 of the Act, the 'court' referred to means the High Court or a judge thereof and 'rules' mean the rules of the court. Consequently, we think that where the Winding-up Rules make specific provisions for a particular matter, it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not, it can always resort to O 92 r 4 of the RHC. The powers of the court on hearing a petition provided by s 221 of the Act are exercised in conformity with RHC and the appeal is a rehearing. I

A The passage from *Halsbury's* just cited supports the view that the contributories and creditors who *appeared* in the court below had an independent right of appeal. They would indeed be well advised to exercise that option, if they wish as of right, to address the appellate court to vary or set aside the High Court order.

B Pargash Singh and Chee Soo Teng were *not* persons who had appeared in the court below. They, therefore, had no right of appeal without leave. Such leave is required not because they are interveners but because they are 'parties' who allowed the judgment to be made against their interests by default of appearance. The point to note here is that in a s 218 petition, the service is by advertisement. Consequently, all creditors and C contributories are 'parties' who are deemed to be served and can participate in the proceedings. Whether or not they appear, they will be bound by the winding-up order because s 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories. When it comes to appealing, we adopt Lindley LJ's remarks in *Re Securities* D *Insurance Company* [1894] 2 Ch D 410 at p 413 where he said:

> I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party, is either bound by the order, or is aggrieved by it, or is prejudicially effected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself E to be aggrieved by an order can make out even a prima facie case why he should have leave, he will get it, but without leave he is not entitled to appeal.

and later on at p 413 he concluded:

> F I think the rule under the old Chancery practice is perfectly well settled; and even in the winding-up of companies with which I was once familiar, I do not recollect a case of a person who alleged himself to be aggrieved appealing without leave, unless he had in some way or other made himself a party to the proceedings.

So a contributory or creditor in a winding-up is a party and not an G intervener in the sense of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, who sought to inject themselves into the proceedings. Wilful failure to participate in the proceedings and acquiescing in the order made will provide grounds for refusal of leave. Pargash Singh and Chee Soo Teng did not explain why they had not appeared in the H court below.

In the result, we unanimously agreed that the application by Pargash Singh and Chee Soo Teng to intervene be dismissed with costs.

This, however, did not resolve the position of the other 57 contributories and 98 parents who had appeared in the court below. Raja I Aziz said he was acting on their behalf also. They had filed the notices required of them by r 28 of the Winding-up Rules and affidavits in opposition. Nothwithstanding the use of the word 'may' in s 289 of the Act, it is the opinion of this court that the wishes of the creditors and contributories must be be taken into account if relevant (see also *Company Law* by Walter Woon at p 500 n 61; *Australian Corporation Law*, Vol 2

(1991) Butterworths, para 5.4.0215). They have a right to be heard in the court of first instance. But whether the court in fact does make the winding-up order is an exercise of discretion because the use of the word 'may' in s 218(f) of the Act is permissive. This is well established by authority.

As to whether these 57 contributories and 98 parents had a right to be heard on the appeal, our view is that unless they had filed a notice of appeal, they have no right. Otherwise they may substantially add to the cost of the appeal without running any corresponding risk of compensating other parties who may be injuriously affected by the protraction of the proceedings. Nevertheless, following *Re Bradford Navigation Co* (1870) LR 5 Ch App 600 that the court may reasonably hear other persons who had an interest in the company as amicus curiae, we indicated to Raja Aziz that we would hear him on the substantive appeal if he was minded to address us.

This was of course subject to the competence of the substantive appeal which En Yusof Khan wished us to strike out.

In *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325, Hashim Yeop A Sani CJ after reviewing the authorities said at p 327:

> *Re Diamond Fuel Company* (1879) 13 Ch D 400 is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.
>
> After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case, it is expressly provided in s 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

This decision was applied in *Taman Sungai Dua Development Sdn Bhd v Goh Boon Kim* [1997] 2 MLJ 526. *Re Mawcon Ltd* [1969] 1 All ER 188 and *Re Laverton Nickel NL* [1997] 3 ACLR 945 are also useful.

For the avoidance of any doubt, we state here that the omission of the company to obtain a stay of the winding-up order under s 243 of the Act in no way limits the residual powers of the directors to prosecute an appeal. A winding-up order which relates back to the date to the filing of the petition (see s 219(2)) generally means the company must stop trading. All actions against the company are stayed as per s 226(3) of the Act and the liquidator then proceeds to evaluate the company's liabilities and to gather in the assets for distribution. A stay of the winding-up means the company is free to continue trading. The absence of a stay does not affect the appellate process, albeit an appeal by itself does not amount to a stay of execution.

On the question of security for the costs of the appeal, we were again referred to the passage from *Halsbury's* earlier cited. The two cases in the second footnote can both be distinguished on the facts. All matters concerning costs are in the discretion of the court and how a discretion should be exercised will vary from case to case. One unusual feature here

A is that the trial judge did not make any order of costs against Fairview Schools Bhd. He ordered costs to the petitioners but absolved the company of any liability to pay the costs. So if this appeal was dismissed, the company would still have no liability for the costs below. The judge said the directors who took over the board on 11 November 1993 should pay the costs of this petition and that the petitioners do file an action against B them for recovery of their costs. The order refers not to the directors but 'those responsible for the problem raised at the 11 November 1992 and 28 August 1994 meetings' without identifying them. None of them were named as respondents to the petition, nor was any relief claimed against them in the petition itself. An order was made against them without their C being heard.

We did not have to go into these matters because to avoid any further delay, Mr Davidson had given his firm's solicitors' undertaking to be responsible for the payment of any costs of this appeals this court may order to be paid to the petitioners. Encik Yusof Khan agreed and both D parties left the amount of the security to the discretion of the court.

After due consideration, we limited the sum required by way of security for the costs of this appeal at RM30,000 only. We made no order as to costs of this second motion because En Yusof Khan's success on the issue of security was neutralised by the failure of his application to strike out. E

Creditors and contributories who wish to support the winding-up order stand in a different position from those who want it varied or set aside. We think they have a right to be heard in the appeal as 'respondents' provided they put themselves on record by invoking s 44 of the Courts of Judicature Act 1964. Mr PS Sundram had not done so but in as much as F we agreed to hear Raja Aziz, we also agreed to allow Mr PS Sundram to address us in the substantive appeal which is the subject of a second judgment.

*Proposed interveners' application for leave dismissed and granting the directors* G *leave to appeal.*

Reported by Lim Kuan Yew

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